IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.200 OF 2002

Indian Oil Corporation Ltd. ... Petitioners

v/s

Varun Shipping Co.Ltd. ... Respondents

Mr Janak Dwarkadas with Mr C.S. Balsara and Mr R.N. Mulla i/b M/s Mulla and Mulla and Craigie Blunt and Caroe for Petitioners.

Mr Ravi Kadam with Mr V.R. Dhond i/b Mr P.J. Ranga for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 21ST NOVEMBER 2005.

P.C. :-

1. By this petition filed under section 34 of the Arbitration and Conciliation Act 1996, the petitioners - Indian Oil Corporation Ltd. challenge the award dated 11th February 2002 made by the Arbitral Tribunal directing the petitioners to pay to the respondents an amount of Rs.2,92,87,789/- with interest. The facts that are relevant and material for deciding this petition are that the petitioners vide Charter Party dated 1st July 1991 chartered the respondents' vessel m.v. Shaktidoot for the period from 28th June 1991 to 30th June 1992 on terms and conditions contained therein. The said Charter Party dated 1st July 1991 contained an arbitration clause being clause No.44 which provided that any dispute or difference between the parties arising under the said Charter Party would be referred to the arbitration of the Arbitral Tribunal, constitution of which was provided for in clause No.44. The said Charter Party dated 1st July 1991 was for the period from 28th June 1991 to 30th June 1992. The Charter Party dated 1st July 1991 was extended for further period by issuing addenda from time to time. The first addenda was dated 14th November 1992, second addenda was dated 27th October 1993, third addenda was

dated 20th December 1994, fourth addenda was dated 13th May 1997, fifth and last addenda was dated 29th June 1998. The last addenda was for the period from 1st July 1998 to 31st August 1998. The fifth addenda dated 29th June 1998 provided that the vessel is hired at the rate of Rs.495/- per long tone DWT p.m. Though by fifth addenda the Charter Party dated 1st July 1991 was continued only upto 31st August 1998, the vessel continued to be used by the petitioners even after 31st August 1998. The parties entered into a fresh Charter Party for the period from 1st September 1999 onwards. So far as the period from 1st September 1998 to 31st August 1999 is concerned, admittedly there was no addenda issued by the petitioners continuing the Charter Party dated 1st July 1991. Admittedly, during this period, the petitioners were paying to the respondents 80 % of the hire charges mentioned in the fifth addenda. It appears that the respondents were demanding that the petitioners should pay 20 % of the amount of hire charges mentioned in the fifth addenda, but the petitioners were declining to make the payment because according to the petitioners, it was agreed between the parties that so far as the period from 1st September 1998 to 31st August 1999 is concerned, the respondents would be entitled to make payment at the rate at which the parties have entered into agreement for the period from 1st September 1999 onwards. As the petitioners

declined to make the payment as per the demand made by the respondents, the respondents invoked the arbitration clause contained in the Charter Party dated 1st July 1991, that led to the constitution of the Arbitral Tribunal. In the statement of claim, it was the case of the respondents that by virtue of clause 4.2 of the Charter Party read with clause 11.1, the Charter Party dated 1st July 1991 as modified by the fifth addenda, continued to operate for the period from 1st September 1998 to 31st August 1999 and therefore, according to the respondents, the respondents were entitled to receive payment for that period at the rate mentioned in the fifth addenda. According to the petitioners, on the other hand, there was no arbitration agreement in existence between the parties during the period from 1st September 1998 to 31st August 1999 (hereinafter referred to as the relevant period) and therefore, the Arbitral Tribunal has no jurisdiction to make the award directing the petitioners to make payment of any amount. The Arbitral Tribunal heard both the sides. The Arbitral Tribunal has held, relying on the provisions of clause 4, clause 6, clause 11 and clause 23 of the Charter Party that the original Charter Party as amended by the fifth addenda, save and except the rate of hire continued to operate so far as the rate of hire is concerned, the Arbitral Tribunal determined the fair rate of hire to be the rate at which the respondents had

submitted its tender. The Arbitral Tribunal also held that as the original Charter Party as amended by the fifth addenda except the rate of hire continued to be in force between the parties, the Arbitral Tribunal has the jurisdiction. The Arbitral Tribunal directed the petitioners to make payment of hire charges at the rate which was quoted by the respondents in the tender submitted by the respondents. It is this award which is challenged in this petition.

2. On behalf of the petitioners, it is submitted that the finding recorded by the Arbitral Tribunal that the original Charter Party as amended by the fifth addenda continued to operate is contrary to the correspondence which is on record. It is submitted that in the letter dated 29th October 1998, the respondents have categorically stated that there is no agreement between the parties for the relevant period. It is further submitted that the respondents have again stated in letter dated 16th October 1998 that the Charter Party for the vessel was valid till 30th June 1998 which was extended till 31st August 1998. It is submitted that in the letter dated 13th January 1999, the respondents have stated in categorical terms that the Charter Party between the parties came to an end on 31st August 1998 and thereafter the vessel continued to render service on adhoc basis. The petitioners also rely on the letter

dated 23rd June 1999 where the respondents stated that the vessel continues to provide service during the relevant period without any contract in place. It is submitted that the Arbitral Tribunal has ignored this correspondence between the parties. It is submitted that the Arbitral Tribunal has referred to some correspondence between the parties and has observed that the correspondence does indicate that there was no specific agreement between the parties during the relevant period. But the Arbitral Tribunal, relying on the provisions contained in the Charter party agreement dated 1st July 1991 has come to the conclusion that the Charter Party continued to operate between the parties. It is submitted that if the correspondence clearly shows that even according to the respondents, the Charter Party has ceased to exist, there was no question of reliance being placed on the same Charter Party to say that it continued to exist. It is submitted that this finding that the Charter Party continued to exist despite clear statement made by the respondents that there was no agreement between the parties during the relevant period suffers from non-application of mind. It is further submitted that even assuming that the finding recorded by the Arbitral Tribunal that the original Charter Party as amended by he fifth addenda continued to operate during the relevant period, save and except the rate of hire, then also the Arbitral

Tribunal could not have decided the rate without arriving at the finding that the parties have agreed on it. It is submitted that section 28 of the Arbitration and Conciliation Act 1996 obliges the Arbitrators to decide the issues in accordance with the terms of contract between the parties and once the Arbitral Tribunal comes to the conclusion that there is no contract between the parties as to the rate, the Arbitral Tribunal could not have decided what would be the fair rate of contract unless there is an agreement between the parties authorising the Arbitral Tribunal to decide fair rate. It is further submitted that awarding of fair rate as has been done by the Arbitral Tribunal amounts to awarding damages. It is submitted that an attempt was made to include a claim for damages in the present arbitration but that amendment was rejected by the Arbitral Tribunal and therefore, the Arbitral Tribunal in these proceedings could not have awarded the damages in the shape of fair hiring rate. It is submitted that the Arbitral Tribunal while deciding the question of existence of arbitration clause has totally lost sight of the provisions of section 7 of the Arbitration and Conciliation Act 1996. It is submitted that as the claim of the respondents before the Arbitral Tribunal was that the original Charter Party as amended by the fifth addenda continued to operate during the relevant period and therefore, it was entitled to

receive payment of hire charges at the rate mentioned in the fifth addenda, once the Arbitral Tribunal found that there was no agreement between the parties on the rate of hire for the relevant period, the only order that could have been made by the Arbitral Tribunal was to reject the reference. The Arbitral Tribunal on its own could not have embarked on the inquiry as to what is the fair rate of hire in the absence of any claim being made before it by the respondents.

3. On behalf of the respondents, on the other hand, it is submitted that it is a well reasoned award made by the Arbitral Tribunal, which is made after following principles of natural justice. The Arbitral Tribunal, by referring to the material on record, has held that the original Charter Party as amended by the fifth addenda, continued to operate during the relevant period. It is a finding of fact recorded by the Arbitral Tribunal by referring to the material on record including the terms of the original Charter Party and therefore, this Court should not disturb that finding. It is submitted that as admittedly the petitioners have availed of the service of the vessel during the relevant period, the respondents were entitled to be paid at a fair rate. The Arbitral Tribunal therefore held inquiry and has arrived at the fair rate of hire and therefore, this Court should not interfere with the award. It is

further submitted that the respondents were claiming hire charges at a higher rate which is mentioned in the fifth addenda, the Arbitral Tribunal has found that it is not entitled to be paid at that rate, but nevertheless it is entitled to fair rate and therefore, the Arbitral Tribunal directed making of payment to the respondents at a reduced rate about which the petitioners could not have made a grievance.

4. Now if in the light of these rival submissions the record of the case is perused, it becomes clear that the Arbitral Tribunal has recorded a finding so far as the aspect of existence of arbitration clause is concerned that the original Charter Party dated 1st July 1991 continued to operate during the relevant period. That finding has been recorded by the Arbitral Tribunal, relying on clauses 4.1, 4.2, 6 and 11 of the Charter Party. The Arbitral Tribunal has also relied on clause 23 but it is an admitted position before me that the respondents had never relied on clause 23 before the Arbitral Tribunal. Before me also, the respondents did not rely on clause 23. Therefore, the provisions of Charter Party that are to be seen for this purpose are clauses 4, 6 and 11. They read as under :-

"4.1 The vessel shall be delivered to Charterers at Mormugoa on 28/06/1991.

4.2 The vessel shall be redelivered to owners on dropping outward pilot at any port at East/West Coast of India Charterers' option. Charterers to give fifteen days' notice of probable port of redelivery.

6.1 Owners agree to let and the Charterers agree to hire the vessel for the period commencing from 20.54 hrs on 28.06.91 to 24.00 hrs on 30.06.92.

11.1 Subject as herein provided, Charterers shall pay for the use and hire of the vessel as stated hereunder:-

11.1.1 For the period 20.54 hrs on 28.06.91 to 24.00 hrs on 30.6.92 at the rate of Rs.281 per ton of 20 CWT or the vessel's total deadweight of 29525 long tons per calendar month, inclusive of overtime and pro-rata for any part of the month and continuing until the time and date of her redelivery to owners.

11.2 For pro-rata rate calculation daily

rate will be calculated using following

formula :-

Daily rate = Monthly Rate/365 x 12."

. It is clear from the award that the Arbitral Tribunal has recorded the finding that the original Charter Party continued to operate save and except the rate of hire only on the basis of above quoted clauses of the charter Party. Perusal of clause 4.1 shows that it only provides the date on which the vessel would be delivered and the place at which it will be delivered. Clause 4.2 lays down as to how the vessel is to be redelivered to the owner. Clause 6.1 provides what was the period of hire originally agreed upon i.e. 28th June 1991 to 30th June 1992. Clause 11 lays down the rate at which payment is to be made, the only part of clause 11 which will be relevant would be the part which lays down that hire charges shall be paid pro-rata for any part of the month and continuing until the date and time for redelivery of the vessel to the owner. Therefore, the only provision in this clause which is relevant for the present purpose is that the hirerer continues to be liable to pay to the owner hire charges agreed upon between the parties mentioned in the agreement till the vessel is redelivered. None of these clauses anywhere lay down that all the terms and

conditions of the Charter Party shall continue to operate even after the expiry of the contract period during the period the vessel continues to be with the hirerer after expiry of the period mentioned in the agreement. Perusal of clause 23 of the Charter Party which has been relied on by the Arbitral Tribunal shows that it does provide for continuation of the terms and conditions mentioned in the Charter Party after expiry of the period mentioned in the Charter Party till the actual delivery of the vessel. But as observed above, clause 23 was not relied on by the respondents either before the Arbitral Tribunal or before this Court. In my opinion, however, clause 23 is relevant for considering the question whether because of clause 11, all terms of the Charter Party continued to operate even after expiry of the period mentioned in the Charter Party till the redelivery of the vessel. It will be useful to refer to provisions of clause 23. It reads as under :-

> "Should the vessel be on her voyage towards the port of delivery at the time of payment of hire is due, payment of hire shall be made for such length of time as Owners and Charterers may agree upon as being the estimated time necessary to complete the voyage, less any disbursements made or expenses incurred or

expected to be incurred by the Charterers for Owners account and less the estimated amount of bunker fuel remaining at the termination of the voyage and when the vessel is redelivered any over payment shall be refunded by Owners or under payment paid by Charterers. Notwithstanding the provisions of clause 4 thereof, should the vessel be upon a voyage at the expiry of the period of this Charter. Charterers shall have the use of the vessel at the same rate and conditions for such extended time as may be necessary for the completion of the round voyage on which she is engaged and her return to a port of redelivery as provisions by the Charter."

. Now if one compares the provisions of clause 11.1.1 with clause 23, it becomes clear that both deal with the situation where the vessel continues to be with the hirerer even after expiry of the period of hire mentioned in the agreement. Clause 23 deals with the situation where the vessel continues with the hirerer even after expiry of the period mentioned in the Charter Party because the vessel is on final voyage which is incomplete on the last date of the Charter Party whereas clause 11.1.1 deals with the situation where the vessel may continue with the hirerer for any reason other than

the vessel being on last voyage. Perusal of clause 11.1.1 shows that in a situation where the vessel continues with the hirerer even after expiry of the period mentioned in the Charter Party for any reason other than the reason that the vessel is in the final voyage, the terms of the contract is relating to payment of hire charges during that period continue to operate whereas when the vessel remains undeliverd on the date mentioned in the Charter Party because the vessel is on incomplete last voyage, not only the terms of the agreement as to the rate but other terms and conditions also continue to operate. According to both the parties, clause 23 does not come into play in this case. Then on the basis of only clause 11.1.1, all that can be said is that the contract between the parties will continue to operate till redelivery only in relation to the rate and therefore, it appears that only on the basis of the provisions of terms of the contract relied on by the Arbitral Tribunal excluding clause 23 , it is impossible to reach the conclusion that all the terms in the original Charter Party including the one providing for arbitration continued to exist and operate during the relevant period. It is clear from the award that the finding of the Arbitral Tribunal that the terms and conditions of the Charter Party continued to operate during the relevant period is really based on the provisions of clause 23 of the Charter Party which

according to both the sides does not come into play and does not operate. In my opinion, the finding of the Arbitral Tribunal that terms and conditions of the Charter Party, especially the arbitration clause, continued to operate during the relevant period is based mostly on clause 23 of the Charter Party and as clause 23 does not come into play, clearly the finding cannot be sustained.

5. It is further to be seen here that to find out whether there was an existing arbitration clause between the parties, one has to refer to the provisions of section 7 of the Arbitration and Conciliation Act 1996.

Section 7 reads as under :-

> "7. Arbitration agreement - (1) In this part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

. It is clear from perusal of section 7 of the Arbitration and Conciliation Act 1996 that the arbitration agreement has to be in writing. The arbitration agreement can be said to be in writing if it is contained in the document signed by the parities or

it is contained in letters and correspondence which is signed by the parties and therefore, in my opinion, the correspondence that was exchanged between the parties had to be considered by the Arbitral Tribunal to find out whether the parities intended to continue arbitration clause contained in the original Charter Party dated 1st July 1991 during the relevant period. In my opinion, the letter dated 29th October 1998 written by the respondents to the petitioners is relevant. Perusal of this letter shows that the vessel m.v. Shaktidoot is specifically mentioned in that letter. The relevant part of the letter reads as under :-

> "Ref: Charter Hire
>
> M.T. Vishwadoot - Period 01.07.98 to 30.11.98
>
> M.T. Shaktidoot - Period 01.09.98 to 30.11.98
>
> M.T. Jaladoot - Period Sept.'98 to Oct.'98
>
> As you are aware, the charter hire for the above vessels are pending for quite some time now. Despite our not receiving the payment, we have been providing services as per the old Agreement. We have made various representations and the undersigned had met you personally on various occasions to emphasize the fact that we are facing acute

> cash flow problems which is seriously affecting our operations. By your non-payment of the charter hire, we are constrained and unable to make payments to our crew members on board the above vessels. This in turn reduces motivation, affects the operating capability of the vessels and charterers' interest. Non-payment of charter hire also means that there is no agreement with shipowners and this will adversely affect your interest in the event of General Average being declared."

. Two things emerge from perusal of this letter - (1) that according to the respondents, though the respondents are not receiving payment, the respondents are providing services as per the old agreement; and (2) that according to the respondents, because the petitioners are not paying hire charges, there is no agreement between the parties. The next letter that is relevant is the letter dated 13th January 1999 from the respondents to the petitioners. The relevant part of the letter reads as under :-

> "The existing arrangement came to an end on 31st August 1998 and the vessels thereafter continue to render services as required on an adhoc basis. In the said message, it is

proposed that a new charter party should be signed with an adhoc rate. We are of the opinion that the new charter party should be signed only after the new rates have been finalised. Further, it is stated that charter party (and presumably even the new rates) shall be subject to final direction that may be received from Government of India. This stipulation would not be acceptable since a bipartite commercial agreement cannot be made subject to the conditions that the Government may deem fit to impose. We feel that such an agreement will be totally open ended. We would be grateful if the new tender is finalised at the earliest."

. In this letter, the respondents have in categorical terms stated that the existing agreement came to an end on 31st August 1998 and thereafter the vessel is rendering services on adhoc basis. It is clear from both these letters that it is not the case of the respondents that the Charter party dated 1st July 1991 as amended by various addendas continues to govern the relationship between the parties during the period from 1st September 1998. The next letter which is relevant is the letter dated 23rd June 1999 addressed by the respondents to the petitioners. paragraph 3 of that

letter is relevant, which reads as under :-

> "3. Meanwhile, the twenty six tankers belonging to various Indian Ship Owners of which two of ours viz. Vishwadoot and Shaktidoot continue to provide service without any contract in place and with unfinalised rates. As the tender is not yet finalised, the Oil Industry has decided to make an adhoc charter hire payment of 80 % of the last charter hire rate as finalised under the last contract for each vessel."

. Perusal of the above quoted letter shows that the respondents have categorically stated that there is no contract in place between the parties for the relevant period. The correspondence thus on record clearly shows that it was the case of the respondents itself that during the relevant period, there was no contract between the parties and that the vessel was rendering services to the petitioners on adhoc basis. In my opinion, in the face of this correspondence between the parties, it was not possible to record a finding that there is an arbitration agreement in existence between the parties within the meaning of Arbitration and conciliation Act 1996. Perusal of the award shows that after referring to some of the

correspondence between the parties, in paragraph 31 it is observed thus :-

> "31. The correspondence referred to earlier makes it clear that the Claimant has not disputed that there was no specific charter or agreement regarding the charter hire in respect of the said vessel after 31st August 1998. Mr Tulzapurkar, learned counsel for the Respondent placed strong reliance on certain letters from the Claimants which can be conveniently referred to here. First of these is a fax communication letter dated 16th December 1998 in which the Claimant have, inter alia, stated that as the Charter Party for both the vessels 'Vishwadoot' and 'Shantidoot' was valid till 30th June 1998, after which it was extended till 31st August 1998 and that the new tender was not finalised. By the said fax letter, Claimant demanded full charter hire to be paid in advance till the tender was finalised in respect of the said vessel. The learned counsel also placed reliance on the letter dated 13th January 1999 from the Claimant which has been referred to in paragraph 30."

. Thus, it appears from the correspondence exchanged between the parties which is on record that the Arbitral Tribunal has also found that it was the case of the respondents that during the relevant period, there was no agreement in existence between the parties. But it recorded the finding that the terms of the Charter Party continued to operate during the relevant period on the basis of the provisions contained in the Charter Party. In my opinion, once the correspondence between the parties indicates that according to the parties, there was no agreement between the parties in relation to the relevant period, a finding that the old Charter Party continued to exist and operate on the basis of provisions contained in that Charter Party, in no case could have been recorded.

6. The Arbitral Tribunal in paragraph 34 has recorded a finding :-

> "The contract contained in the charter therefore continued to be operative on the same terms and conditions save and except in regard to the rate which formed the subject matter of negotiations between the parties."

. Thus, there is a clear finding recorded by the Arbitral Tribunal that there was no agreement between

the parties about the rate at which the respondents are to be paid during the relevant period. In my opinion, since the Arbitral Tribunal has reached the conclusion that there was no concluded contract between the parties in relation to the rate at which the respondents were to be paid during the relevant period, the Arbitral Tribunal should have stopped and could not have proceeded further in view of the provisions of sub-section (3) of section 28 of the Arbitration and Conciliation Act 1996. Section 28(3) reads as under :-

> "28(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

. Section 28(3) casts a duty on the Arbitral Tribunal to make an award in accordance with the terms of the contract. Perusal of provisions of sub-section (2) of section 28 shows that the Arbitral Tribunal can decide the issue on equitable considerations only if the parties have authorised the Arbitral Tribunal to do so.

Sub-section (2) of section 28 reads as under :-

> "28(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only

if the parties have expressly authorised it to do so."

. The reading of sub-sections (2) or (3) of section 28 would show that unless and until there is a specific authorisation given to the Arbitrators in the arbitration clause, the Arbitrators are not entitled to decide the dispute referred to them on equitable considerations. They will have to go as per the contract between the parties. Once the Arbitral Tribunal comes to the conclusion that on a particular aspect, there is no contract between the parties, the Arbitral Tribunal would not be justified in making an award in that regard. In my opinion, after having reached the conclusion that there was no concluded contract between the parties about the rate of hire during the relevant period, the Arbitral Tribunal could not have made the award because making of an award for payment to the respondents at any rate either higher or lower than the rate which is mentioned in the original Charter Party as amended by the fifth addenda, would amount to awarding of damages. The claim for damages was attempted to be included by the respondents but that request was declined by the Arbitral Tribunal. Therefore, once the Arbitral Tribunal reached the conclusion that the rate of hire contained in the fifth addenda was not agreed to be continued during the

relevant period by the parties, the Arbitral Tribunal could not have held further inquiry in the absence of any claim made by the claimants. In the present case, that inquiry was totally uncalled for because of the rejection of the request of the respondents for inclusion of the claim for damages. Perusal of the letter written by the respondents to the petitioners dated 29th August 2001 shows that the respondents were contemplating making a fresh reference claiming reasonable compensation for use of the vessel by the petitioners during the relevant period in the alternative to its claim that it is entitled to be paid for that period at the rate mentioned in the Charter Party as amended by the fifth addenda. It is clear that an inquiry and finding as to what would be the fair compensation for the relevant period firstly could not have been made by the Arbitral Tribunal because of the provisions of section 28, secondly because there was no claim made by the respondents for being paid fair compensation, thirdly because the same Arbitral Tribunal has rejected the request of the respondents for inclusion of the claim for fair compensation in the statement o claim. Thus, taking overall view of the matter, therefore, in my opinion, it is not possible to sustain the award. The award, in my opinion, is liable to be set aside. It is accordingly set aside. The respondents are directed to pay costs of the petition to

the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.